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No. 939

In the

Supreme Court of the United States

OCTOBER TERM, 1956

E. L. MARKHAM, JR., *et al.*,
Petitioners,

v.

R. O. BURCHFIELD, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AT AUSTIN, TEXAS

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

E. L. Markham, Jr., petitioner herein, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Texas, Sitting at Austin, Texas, reversing the judgment of a trial court and the Court of Civil Appeals for the First Supreme Judicial District of Texas, which was in favor of petitioner, and rendering judgment that petitioner take nothing against respondents, R. O.

Burchfield, individually, and W. G. Burchfield & Bro., a partnership composed of W. G. Burchfield, R. O. Burchfield and R. H. Burchfield.

PREFATORY REMARKS WITH RESPECT TO THE CERTIFIED COPY OF THE RECORD OF THE STATE COURT PROCEEDINGS

Two appeals have been had of this case from the trial court, the first of which was through the above mentioned Court of Civil Appeals and to the Supreme Court of Texas, and the second of which was through both the above mentioned Court of Civil Appeals and the Supreme Court of Texas. In order that all questions involved may be properly presented herein, petitioner files in connection with this petition, a certified copy of the entire record of the proceedings had in the first appeal consisting of two parts, the first part consisting of 414 pages, and being identified on its first page and herein referred to as R-1 Part 1, and the second part consisting of 29 pages, and being identified on its first page and herein referred to as R-1 Part 2, and a certified copy of the entire record of the proceedings had in the second appeal, which resulted in the judgment herein sought to be reviewed, consisting of one part of 623 pages and being identified on its first page and herein referred to as R-2.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Civil Appeals in said first appeal (R-1 Part 1, 98-101), printed in Appendix B hereto, infra, p. 31, is reported in 267 S. W. 2d 866 and its judg-

ment (R-1 Part-1, 102-103) also is printed in said Appendix B, infra, p. 38. The opinion of the Court of Civil Appeals in said second appeal (R-2 429-439), printed in Appendix C hereto, infra, p. 41, is reported in 287 S. W. 2d 733 and its judgment (R-2 454) also is printed in said Appendix C hereto, infra, p. 57. The opinion of the Supreme Court of Texas in said second appeal (R-2 577-581), printed in Appendix D hereto, infra, p. 59, is reported in 294 S. W. 2d 795, and its judgment (R-2 582), which is the judgment herein sought to be reviewed, also is printed in Appendix D hereto, infra, p. 67. All motions for rehearing in connection with all of such three appellate court decisions, were overruled by formal orders (R-1 Part 1, 103), (R-2 457) and (R-2 601), respectively, and with no written opinion.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on October 31, 1956 (R-2 582); infra, p. 67. Rehearing was denied on November 28, 1956. (R-2 601.) By order of this Court dated February 26, 1957, extension of time within which to file petition for a writ of certiorari herein, was extended to April 25, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257(3) on two grounds, to-wit:

(1) The validity of a state statute, as said statute was arbitrarily, unjudicially and unlawfully construed and applied by the Supreme Court of Texas, in writing the opinion and rendering the judgment herein sought to be reviewed,

is repugnant to the clause of the 14th Amendment of the Constitution of the United States, which reads as follows, to-wit:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *" and

(2) Under and by reason of such arbitrary, unjudicial and unlawful construction and application so made, adopted and followed by the Supreme Court of Texas, in writing the opinion and rendering the judgment herein sought to be reviewed, petitioner has been deprived of a title, right, privilege or immunity which is specially set up or claimed under the Constitution of the United States or under authority exercised under the United States.

The federal questions herein involved, were raised by petitioner by assignments of error in his motion for rehearing in the Supreme Court of Texas (R-2 584-593) and same were therein properly and timely raised as a prerequisite for jurisdiction of this Court because such federal questions were raised for the first time, in the course of proceedings in the courts below, when the Supreme Court of Texas delivered and filed its opinion and decision, and rendered and entered its judgment herein on October 31, 1956, and nothing occurred at any prior stage of the proceedings or in any decision by any court of this state, to foreshadow or adumbrate the decision and judgment made by the Supreme Court of Texas in violation of petitioner's federal rights. See *Great Northern R. Co. v. Sun-*

burst Oil Co., 287 U. S. 358, 366-7; Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, 677-8; Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320; Saunders v. Shaw, 244 U. S. 317, 320; Cole v. Arkansas, 333 U. S. 196, 200; cf. *American Surety Co. v. Baldwin, 287 U. S. 156, 162-4; Wilson v. Cook, 327 U. S. 474, 485, n; Herndon v. Georgia, 295 U. S. 441.*

Petitioner's motion for rehearing in the Supreme Court of Texas, filed on November 15, 1956 (R-2 583), was overruled on November 28, 1956 by formal order (R-2 601) without written opinion.

No non-federal ground existed upon which the opinion, decision and judgment of the Supreme Court of Texas could have been based, none was raised by respondents in their Application for Writ of Error (R-2 458-497) and none was considered and discussed in the Supreme Court of Texas' opinion (R-2 577-582) infra, p. 59.

QUESTION PRESENTED

Whether the Supreme Court of Texas can deprive petitioner, who is a licensed attorney but not a licensed real estate dealer under The Real Estate Dealers License Act (See Appendix A, infra, p. 21), of the right to enforce in the courts of this state, payment by respondents, who are licensed real estate dealers under said Act, of petitioners' one-half share in a real estate commission, which was due and payable under an agreement previously had between them, by holding such agreement unlawful and

unforceable, and rendering and entering judgment in accordance with such holding, on the pretended ground that certain provisions of said Act made such agreement unlawful and unforceable, when the language of the particular statute will permit of no construction except that the Legislature of the State of Texas intended that a transaction of the kind and character herein involved should be excepted and exempted from all provisions of said Act.

STATUTE INVOLVED

The statutory provisions involved are contained in Article 6573a of Vernon's Annotated Civil Statute of Texas, which is officially designated as "The Real Estate Dealers License Act." Provisions of said Act pertinent hereto are printed in Appendix A, infra, p. 21.

STATEMENT

This litigation is an action by petitioner against respondents to enforce payment by respondents of petitioner's one-half share in a real estate commission. The real estate transaction from which accrued the real estate commission involved was initiated by petitioner, who was a licensed attorney but not a licensed real estate dealer under The Real Estate Dealers License Act, in that petitioner, after having been engaged by the real estate purchaser to locate a tract of land of a certain general description, obtained from respondents, who were licensed real estate dealers under said Act, an agreement that for petitioner's furnishing to res ondents, contact with said purchaser, respond-

ents would share equally with petitioner the real estate commission accruing to respondents upon, and in event of, consummation of such transaction with a seller provided by respondents. When petitioner's right to one-half of such real estate commission had accrued, respondents made known to petitioner their denial of petitioner's such right and thereupon petitioner made his claim known to sellers, who withheld payment to respondents of the one-half of the real estate commission so in dispute and after the commencement of this litigation, sellers deposited same into the registry of the trial court on interpleader.

Respondents defended against petitioner's claim for said share of such real estate commission on several grounds, all of which grounds, except the one on which the Supreme Court of Texas reversed and rendered the case, had been either foreclosed or eliminated before this litigation reached the Supreme Court of Texas by jury trial and verdict (R-2 53-56), the judgment of the trial court thereon (R-2 60-69), the presumed findings of the trial court under Rule 279 of the Texas Rules of Civil Procedure, which is shown and discussed in the opinion of the Court of Civil Appeals (R-2 436-438) and the opinion (R-2 429-439) and judgment (R-2 454) of the Court of Civil Appeals.

Respondents contended that certain provision of the Real Estate Dealers License Act proscribed said agreement between respondents and petitioner to share said real estate commission, rendering it unlawful and unenforceable because while respondents were licensed real estate dealers

under said Act, petitioner was not. Petitioner countered with the contention that the language of the statute so contended to proscribe such agreement and render it unlawful and unenforceable, will permit of no construction than that the Legislature of the State of Texas, intended that agreements of the kind and character herein involved should be excepted and exempted from all provisions of said Act and that same should not be unlawful and unforceable.

The questions, therefore, are:

First, whether the Supreme Court of Texas in its decision and judgment that the agreement involved was unlawful and unenforceable under certain provisions of the Real Estate Dealers License Act, ascribed to such statutes a meaning that the Legislature of the State of Texas could not possibly have intended, and if so,

Second, whether its action in so construing and applying such statutes violated any of petitioner's federal rights and deprived him of benefits thereunder.

Addressing very brief discussion to the first of such questions, we point out that Section 2(a)(1) of the Act, so far as pertinent hereto, reads:

> "The term 'Real Estate Dealer' shall include every person or company, *other than a salesman and licensed and registered attorneys*, who for another or others for compensation or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting compensation or other valuable consideration, list for sale, sells, exchanges, buys, * * * or assists or directs in the pro-

> curing of prospects, or the negotiation or closing of any transaction which does or is calculated to result in the sale * * * of any real estate * * *." (Emphasis ours.)

and Sections 11 and 20 of said Act, which the Supreme Court of Texas held to proscribe the agreement involved and render it unlawful and unenforceable, read, so far as pertinent hereto, as follows:

> "Sec. 11. * * * The Administrator of the Securities Division of the office of Secretary of State may * * * suspend or revoke or refuse to renew the license of any licensee who at any time has:
>
> * * * * *
>
> "(5) Paid commissions or fees to, or divided commissions or fees with anyone not licensed as a real estate dealer or salesman, * * *.
>
> "Sec. 20. It shall be unlawful for any real estate dealer or real estate salesman to offer, promise, allow, give, or pay directly or indirectly any part or share of his commission or compensation arising or accruing from any real estate transaction to any person who is not a licensed dealer or salesman in consideration of service performed or to be performed by such unlicensed person * * *."

It is respectfully pointed out that under the decision of the Supreme Court of Texas and the plain provisions of such quoted sections of the Act, the sole ingredient or element of the agreement and transaction involved which brought same within the proscription of Sections 11 and 20 of the Act, was that petitioner was not licensed as a real estate dealer. When the Legislature of the State of Texas specially defined the term "Real Estate Dealer"

for use in the Act (Appendix A, p. 21, infra), and included in the very heart thereof "other than * * * licensed and registered attorneys," it meant that licensed and registered attorneys should be excepted and exempted from the special definition of the term, real estate dealer, wherever in said Act such term might be used. Both in Sections 11 and 20 of said Act, the Legislature used the term, "real estate dealer" in describing and defining, as to status under the Act, the person to whom, if a licensed real estate dealer should offer, promise, allow, give or pay any part of his commission, would bring the transaction within and under the proscription of said Sections 11 and 20 of the Act. Licensed and registered attorneys, being excepted and exempted from the term real estate dealer, are, therefore, removed from the Legislature's description and definition of the persons to whom, if a licensed real estate dealer should offer, promise, allow, give, or pay any part of his commission, would bring the transaction within and under the proscription of said Sections 11 and 20 of this Act.

With respect to the second of such questions, there can be no question that since petitioner, although not a licensed real estate dealer under the Act, was a licensed attorney and exempt from all the provisions thereof, and particularly Sections 11 and 20 thereof; that such exemption and exception left him in his common law status with respect to the agreement and transaction involved, and that, therefore, the decision and judgment of the Supreme Court of Texas, depriving him of his right at common law, which

was preserved from the proscriptions of the Act by the exception and exemption in the term real estate dealer, to enforce in the courts of this state, payment by respondents of his one-half share in said real estate commission, constitutes judicial legislation and a violation of, and deprivation of, petitioner's federal rights.

That such conduct of the Supreme Court of Texas is contrary to, and in violation of, the clause of the 14th Amendment of the Constitution of the United States, which reads as follows, to-wit:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *."

in that Article II, Section 1 of the Constitution of the State of Texas, provides as follows, to-wit:

> "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

we cite the following authorities: *Atlantic Coast Line Railroad Co. v. Phillips, 332 U. S. 168; 9 Texas Jurisprudence, Constitutional Law, page 450, Section 36; 11 American Jurisprudence, Constitutional Law, pages 876 and 883, Sections 180 and 184, respectively,* and *16 C. J. S., page 483, Section 104.*

Although somewhat collateral to the federal question involved, the Supreme Court of Texas, in reaching its conclusion and decision on said federal question, made many grossly erroneous rulings and holdings, which are highly important and material to this Honorable Court's consideration of such federal question because such rulings and holdings reflect the attitude of arbitrariness, unjudiciality and unlawfulness which marked the course of the Supreme Court of Texas in its decision, reversing and rendering this case against petitioner. We point out the grossest of such errors briefly as follows:

Notwithstanding

(a) That the question, of whether the agreement involved was proscribed by the provisions of the Real Estate Dealers License Act and was unlawful and unenforceable by reason thereof, had been decided favorably to petitioner's contention that such agreement was lawful and enforceable five times in the course of the two appeals of this case, to-wit: twice by the trial court, such question being there raised by special exception (R. 1 Part 1 32, 40 et seq., 45; R. 2, 5-6, 17 et seq., 32); twice by the Court of Appeals (see its two opinions, Appendix B, p. 31, infra, and Appendix C, p. 41, infra), and once by the Supreme Court of Texas (see R. 1 Part 2, Application for Writ of Error, p. 7; Reply to Application for Writ of Error, pp. 25, 26, and order refusing writ of error, p. 28),

(b) that such question under the procedure followed was unavoidably the first question that each of such courts was

compelled to consider and decide on each of the occasions when this litigation was before each of such courts; and

(c) the considered question was clearly decided correctly the first five times, the Supreme Court of Texas, for no semblance of any judicial reason, granted the writ of error and reversed and rendered the judgment of the trial court and the Court of Civil Appeals on the considered question of law and in so doing, also overruled the prior decision and judgment on the appeal of said summary judgment proceedings.

Such actions and decision of the Supreme Court under the circumstances shown was contrary to and in violation of rules of law which were applicable and controlling and should have been applied and followed, viz:

(1) Since the question of the illegality and unenforceability of the agreement was apparent on the face of the record [see paragraph (a) above] in the first appeal of this case, the Supreme Court of Texas not only had the jurisdiction and right, but it had an affirmative duty to grant the application for writ of error and reverse and render this case against petitioner, rather than refuse the application for writ of error, thus approving the judgment of the Court of Civil Appeals remanding the case for trial before a jury, because if such agreement was actually unlawful and unforceable, such constituted fundamental error apparent on the face of the record. *Texas Jurisprudence, 3-B, Appeal and Error, page 22 et seq., Section 676 et seq.; Id., page 43, Section 690.*

(2) Since the Supreme Court of Texas, as stated by it in its opinion herein involved, approved the judgment of the Court of Civil Appeals, but not its opinion in the first appeal of this case, holding the agreement involved to be lawful and enforceable, Appendix D, p. 59 infra, it, the Supreme Court of Texas, necessarily and unavoidably approved the holding of said Court of Civil Appeals that the agreement was not unlawful and unenforceable because such was an indispensable underlying legal element and ingredient of said Court of Civil Appeals' such judgment. *Texas Jurisprudence 11, Courts, pages 836-837, Section 94.*

(3) Assuming the correctness of paragraph (2) preceding, the Supreme Court of Texas in writing the opinion and rendering the judgment involved, was bound by the "law of the case" since it had no "good reason" and stated none for reversing its prior decision and judgment adjudicating the agreement involved to be lawful and enforceable. *Texas Jurisprudence 3-B, Appeal and Error, pages 776 et seq., Section 1111 et seq.*

(4) Under the circumstances stated in paragraph (1) above, the Supreme Court of Texas not only had the jurisdiction and right but it had the duty to, if the agreement involved was actually unlawful and unenforceable, on the first appeal of this case, grant the application for writ of error, hold such agreement to be unlawful and unenforceable and reverse and render same against petitioner, because under the decisions of federal and other state jurisdictions, whose summary judgment proceedings rules are

identical to those of the State of Texas, judgment may be rendered against movant in summary judgment proceedings. *Carpineta v. Shields (Florida Sup. Ct.), 48 A. L. R. 2d 1185*, the federal cases cited therein and all cases shown in the annotation thereto; *Rule 166-A, Texas Rules of Civil Procedure* (Appendix E, p. 69, infra).

REASONS FOR GRANTING WRIT OF CERTIORARI HEREIN

We are confident that petitioner has clearly shown that the conduct and action of the Supreme Court of Texas in reversing and rendering the judgment against him was arbitrary, unjudicial and unlawful. We respectfully submit that the importance of the granting of a writ of certiorari herein, reaches far beyond the limits of this particular litigation, for the reason that the conduct and action of said court below in this case is but an example and small segment of the arbitrary, unjudicial and unlawful action and conduct to which your undersigned attorney for petitioner has been subjected for the last three years or longer because on or about May 20, 1954, as attorney for plaintiff, he filed in the United States District Court for the Northern District of Texas, Fort Worth Division, Civil Action No. 2801, styled William L. Hanna v. Home Insurance Company and on transfer of said action on defendant's plea of venue to the Dallas Division of said court same became Civil Action No. 6271 on the docket of said Division of such court where same is still pending and being handled by your undersigned attorney. In said action plaintiff

seeks to recover damages for personal injuries to plaintiff's wife and damages to his automobile resulting from an automobile collision accident caused by the negligent operation by defendant's state manager for Texas of defendant's automobile in the City of Dallas, Texas on or about September 11, 1950, actual damages sustained by plaintiff as a result of the conspiracy, collusion and fraud of the judges, court attaches, court officials, attorneys for defendant, defendant's said state manager and defendant, in connection with and through state court proceedings from the trial court through the Supreme Court of Texas, in which plaintiff attempted litigation of his said claim for such personal injury and automobile damages, which said conspiracy was pursued and continued on into the said United States District Court for the Northern District of Texas, the purposes and objective of which conspiracy was to deprive plaintiff of a fair and impartial trial, to deprive him of a reasonable opportunity to be heard and to prevent, at any and all events, any recovery therein by him, all of which purposes and objectives were fully accomplished, and exemplary damages by reason of said conspiracy, collusion and fraud and also by reason of defendant's complicity in the infamous $10,000,000.00 conspiracy, official bribery and fraud case in the State of Missouri involving the late Tom Pendergast, the Superintendent of the Department of Insurance of the State of Missouri, and many other persons and large insurance companies with nationwide operations, *200 S. W. 2d 1.* The total recovery therein sought, the greater portion of which is for exemplary damages is an amount of more

than $45,000,000.00 or slightly more than 10% of the admitted assets of said defendant. That since shortly after the incipience of the aforesaid Hanna v. Home Insurance Company litigation, your undersigned attorney has, somewhat as a matter of usual course, been subjected to arbitrary, unjudicial and prejudicial conduct by certain of the judges of this state from both the trial court and appellate court levels. That at this time, your undersigned attorney is in process of handling and preparing for presentation to this Honorable Court on applications for writs of certiorari, three or more cases including the instant case and the above mentioned Hanna v. Home Insurance Company case, and he has in mind to make appropriate cross references between such several applications and has hopeful expectations of getting all of same considered and acted on by this Honorable Court at the same time. That full and complete reasons for the arbitrary, unjudicial and prejudicial conduct of said judges and particularly those of the Supreme Court of Texas, against your undersigned attorney in connection with his handling of all of such cases will clearly appear upon such contemporaneous presentation and consideration of all of such cases by applications for certiorari with appropriate cross references between all of such applications and the full and clear picture thereof can be forcefully presented in no other manner. Such manner of presentation with the composite resulting aspect of the federal questions raised and presented in each and all of such several cases, will reflect that all of such cases and the federal questions involved therein all have, in superlative degree, the importance

contemplated and required for the granting of writs of certiorari by this Honorable Court.

The attention of the court is directed to the motion which petitioner has filed contemporaneously with the filing of this petition for writ of certiorari for an order of this Court that consideration of, and action on, this petition be deferred for sixty days.

We wish to point out the ironic anomaly of the pyrrhic victory that the court below handed to respondents by reversing and rendering the judgment against petitioner. Under the decision and judgment of the Supreme Court of Texas, respondents can never get the money involved in this litigation, because such money is in the registry of the trial court under an interpleader by seller of the real estate and since any right which respondents may assert thereto must involve his unlawful agreement with petitioner, and petitioner's efforts in performance thereof, such would have the concomitant effect of raising a ban against any court making an affirmative order to the clerk of the trial court to pay such money over to respondents.

CONCLUSION

For all the reasons reflected and shown hereinabove, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CURTIS E. HILL,
2521 Republic Bank Building,
Dallas 1, Texas,
Attorney for Petitioners.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari has been mailed, on the 24th day of April, 1957 to Honorable George Red and Pat Fahey, 1513 Travis Street, Houston, Texas, attorneys for respondents, and Messrs. Liddell, Austin, Dawson and Huggins, 1017 Chronicle Building, Houston, Texas, attorneys for intervenors in the state court proceedings.

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CURTIS E. HILL

APPENDIX A

REAL ESTATE DEALERS

Art. 6573a. Real estate dealers licenses

Short title of act

Section 1. This Act shall be known and may be cited as "The Real Estate Dealers License Act."

Definitions

Sec. 2. The following terms shall, unless the context otherwise indicates, have the following meanings:

(a). (1). The term "Real Estate Dealer" shall include every person or company, other than a salesman, and licensed and registered attorneys, who for another or others for compensation or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting compensation or other valuable consideration, lists for sale, sells, exchanges, buys, or rents, or offers, or attempts, or agrees to negotiate a sale, exchange, purchase, or rental of an estate or interest in real estate, or collects, or offers, or attempts, or agrees to collect rent for the use of real estate, or negotiates, or offers, or attempts, or agrees to negotiate a loan, secured or to be secured by mortgage or other incumbrance upon or transfer of real estate; or auctions, or offers, or attempts, or agrees to auction any real estate; or appraises, or offers, or attempts, or agrees to appraise any real estate; or who advertises, or holds itself, himself, or themselves out

as engaged in the business of selling, exchanging, buying, renting, or leasing real estate, or assists or directs in the procuring of prospects, or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate, or who buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate or in the improvements thereon.

(2). The term "Real Estate Dealer" shall also include any person or company employed by or on behalf of the owner or owners of lots or other parcels of real estate at a stated salary, or upon a commission, or upon a salary and commission basis, or otherwise, to sell such real estate in any parts thereof, in lots or other parcels, and who shall sell or exchange, or offers, or attempts, or agrees to negotiate the sale or exchange of any such lot or parcel of real estate; provided, however, if the owner of lots or other parcels is engaged in the business of buying, selling, exchanging, leasing, renting of property and holding himself out as a full or part-time dealer in real estate, then such person employed by said owner may be licensed as a salesman of said owner if said owner has been licensed as a dealer in real estate.

(3). The term "Real Estate Dealer" shall also include any person or company engaged in the business of buying, selling, exchanging, leasing, renting of property on his or its own account and holding himself or itself out as a full or part-time dealer in real estate.

(b). The term "Real Estate Salesman" shall mean and include any person or company employed or engaged by or in behalf of a licensed real estate dealer to do or deal in any act, acts, or transactions set out and comprehended by the definition of a "Real Estate Dealer" in Section 2, Subsection (a) of this Act.

(c). If the sense requires it, words in the present tense include the future tense; in the masculine gender, include the feminine or neuter gender; in the singular number, include the plural number; in plural number, include the sningular number; "and" may be read "or"; and "or" may be read "and."

Persons not covered by act

Sec. 3. The provisions of this Act shall not apply to, and the terms "Real Estate Dealer" and "Real Estate Salesmen," as above defined, shall not include:

(a). Any person or company who, as owner or lessor, shall perform any of the acts set out in Section 2, Subdivision (a) with reference to property owned or leased by them, or to the regular employees thereof with reference to the property owned or leased by such person or company where such acts are performed in the regular course of, or as incident to, the management of such property and the investment therein, unless such person or company is engaged in the business of buying, selling, exchanging, leas-

ing, or renting of property and holding himself or itself out as a full or part-time dealer in real estate.

(b). Persons acting as an attorney in fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate; services rendered by an attorney at law, receiver, trustee in bankruptcy, administrator, or executor, or any person doing any of the acts specified in Section 2, Subdivision (a) of this Act under order of any court; a trustee acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof.

(c). Any person, partnership, or corporation who has secured a license under Texas Securities' Act, House Bill No. 521, Regular Session, Forty-fourth Legislature.

Grounds for suspending, revoking or refusing to renew license

Sec. 11. The Administrator of the Securities Division of the office of the Secretary of State may upon his own motion and shall upon the verified complaint in writing of any person, investigate the actions of any real estate salesman or real estate dealer or any person who shall assume to act in either such capacity within this State, and may suspend or revoke or refuse to renew any license at any time where the real estate salesman or real estate dealer in performing or attempting to perform any act as a real

estate dealer or real estate salesman, or in any transaction involving the leasing or sale of an interest in real estate, is guilty of:

(1). Knowingly making any substantial misrepresentation, or

(2). Making any false promises with intent to influence, persuade, or induce, or

(3). Pursuing a continued and flagrant course of misrepresentation or the making of false promises through agents or salesmen, or advertising or otherwise, or

(4). Acting for more than one party in a transaction without the knowledge or consent of all parties thereto, or

(5). Failure within a reasonable time to account for or to remit any moneys coming into his possession which belong to others, or

(6). Any other conduct, whether of the same or a different character than hereinabove specified, which constitutes dishonest dealings.

The Administrator of the Securities Division of the office of the Secretary of State may also suspend or revoke or refuse to renew the license of any licensee who at any time has:

(1). Procured a license under this Act for himself or any salesman by fraud, misrepresentation, or deceit, or

(2). Has been convicted of a felony, knowledge of which the Administrator of the Securities Division of the office

of the Secretary of State did not have at the time of last issuing a license to such licensee, or

(3). Wilfully disregarded or violated any of the provisions of the law, or

(4). Demanded from an owner a commission to which he is not justly entitled, or

(5). Paid commissions or fees to, or divided commissions or fees with anyone not licensed as a real estate dealer or salesman, or

(6). Used any trade name or insignia of membership in any real estate organization of which he is not a member, or

(7). Accepted, given, or charged any undisclosed commission, rebate, or direct profit on expenditures made for a principal, or

(8). Solicited, sold, or offered for sale real property by offering "free lots" or conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real property, or

(9). Acted in the dual capacity of broker and undisclosed principal in any transaction, or

(10). Guaranteed, authorized, or permitted any person to guarantee future profits which may result from the resale of real property, or

(11). Placed a sign on any property offering it for sale or for rent without the written consent of the owner or his authorized agent, or

(12). Induced any party to a contract of sale or lease to break such contract for the purpose of substituting in lieu thereof a new contract with another principal, or

(13). Negotiated the sale, exchange or lease of any real property directly with an owner or lessor knowing that such owner or lessor had a written outstanding contract granting exclusive agency in connection with such property with another real estate broker, or

(14). Offered real property for sale or for lease without the knowledge and consent of the owner or his authorized agent, or any terms other than those authorized by the owner or his authorized agent, or

(15). Published advertising whether printed, radio, display, or any of any other nature which was misleading, or inaccurate in any material particular, or in any way has misrepresented any properties, terms, values, policies, or services of the business conducted, or

(16). Knowingly withheld from or inserted in any statement of account or invoice any statement that made it inaccurate in any material particular, or

(17). Published or circulated unjustified or unwarranted threats of legal proceedings which tended to or had the effect of harassing competitors or intimidating their customers.

This Section of this Act shall not be construed to relieve any person or company from civil liability or from criminal prosecution under this Act or under the laws of this State.

Dividing commissions with others

Sec. 20. It shall be unlawful for any real estate dealer or real estate salesman to offer, promise, allow, give, or pay directly or indirectly any part or share of his commission or compensation arising or accruing from any real estate transaction to any person who is not a licensed dealer or salesman in consideration of service performed or to be performed by such unlicensed person, and no real estate salesman shall be employed by or accept compensation from any person other than the dealer under whom he is at the time licensed, and it shall be unawful for any licensed real estate salesman to pay a commission to any person except through the dealer under whom he is at the time licensed.

Violations of act

Sec. 21. (a). Any person, or agent, officer, or employee of any company, acting as a real estate dealer or real estate salesman within the meaning of this Act, without first having been licensed by the Administrator of the Securities Division of the office of the Secretary of State, and every officer, agent, or employee of any company, and every other person who knowingly authorizes, directs, or aids in the publication, advertisement, distribution, or circulation of any false statement or representation concerning any land or subdivision offered for sale or lease, and every person who, with knowledge that any advertisement, pamphlet, prospectus, or letter concerning any land or subdivision contains any written statement that is false

or fraudulent issues, circulates, publishes, or distributes the same, or shall cause the same to be issued, circulated, published, or distributed, or who, in any other respect, wilfully violates or fails to comply with any provisions of this Act, or who in any other respect wilfully violates or fails, omits or neglects to obey, observe or comply with any order, permit, decision, demand, or requirement of the Administrator of the Securities Division of the office of the Secretary of State under this Act as herein provided, shall upon conviction therefor be sentenced to pay a fine of not more than Five Hundred Dollars ($500) or imprisonment in the county jail for not more than one year or both such fine and imprisonment.

(b). This Act shall not apply to the sale of any property when such sale is made by the owner, or one of the owners, or the attorney for said owner or owners.

APPENDIX B

BURCHFIELD et al. v. MARKHAM et al.

No. 12711.

Court of Civil Appeals of Texas.

Galveston.

April 22, 1954.

Rehearing Denied May 13, 1954.

Action for share of commission accruing from sale of land. The District Court, Harris County, Roy F. Campbell, J., entered judgment for plaintiffs and defendant appealed. The Court of Civil Appeals, Hamblen, Jr., C. J., held that where attorney at law and real estate broker negotiated as agents for purchase and sale of land, any contract between them to share commission accruing from such sale was not void or unenforceable.

Reversed and remanded.

1. Judgment—Key No. 181(18)

In action on contract to share commission for sale of land, where one plaintiff had no interest in action and had claimed no right to recovery sought but had become party plaintiff only as accommodation to other plaintiff, summary judgment in favor of accommodation plaintiff was unauthorized.

2. Judgment—Key No. 181(2)

Where facts and circumstances surrounding transactions between parties are disputed, existence of any genuine issue of fact prevents granting of summary judgment.

3. Brokers—Key No. 1

Statute defining real estate dealers, requiring licenses of persons or companies engaging in real estate business as dealers, and providing penalties for violations of its provisions is penal in nature and must be strictly construed. Vernon's Ann.Civ.St. art. 6573a.

4. Brokers—Key No. 66

Where attorney at law and real estate broker negotiated as agents for purchase and sale of land, any contract between them to share commission accruing from such sale was not void or unenforceable. Vernon's Ann.Civ.St. art. 6573a, §§ 2, 3, 20.

5. Costs—Key No. 173(1)

Action on contract to share commission for sale of land was suit for alleged breach of contract for payment of money and did not fall within statute providing for recovery of attorney's fees by person having valid claim for personal services rendered or labor done. Vernon's Ann. Civ.St. art. 2226.

6. Brokers—Key No. 87

In action on contract to share commission accruing from sale of land, where sale thereof was negotiated by attorney at law and real estate broker under alleged agreement for equal shares in commission, and seller paid one-half of commission to broker and tendered remaining one-half into registry of court under bill of interpleader, exemplary damages could not be recovered.

George Red and K. D. Keenan, Houston, for appellants.
Curtis E. Hill, Dallas, for appellees.

HAMBLEN, Jr., Chief Justice.

"Appellees instituted this suit in the District Court of Harris County to recover the sum of $4,858.65, being one-half of the commission paid upon the sale of property in Harris County, Texas. Appellees claimed to be entitled to the sum sued for under the terms of a contract alleged to exist between them and appellants." Appellees also sought recovery of attorney's fees under the provisions of Art. 2226, Revised Civil Statutes, Vernon's Ann.Civ.St., and exemplary damages. Appellants excepted to certain portions of the appellees' petition, particularly the allegations and prayer for attorney's fees and exemplary damages, generally denied all of appellees' allegations, specially denied the existence of the contract alleged upon, and by way of avoidance, plead that the contract, if made, was void under the provisions of Art. 6573a, Revised Civil Statutes, Vernon's Ann.Civ.St. Appellants' exceptions di-

rected to the prayed for recovery of attorney's fees and exemplary damages were sustained by the trial court. Appellants thereupon filed a motion for summary judgment, which was denied. Appellees thereupon moved for summary judgment in their favor, which was granted. Appeal was perfected both from the order denying summary judgment in favor of appellants and the order granting summary judgment in favor of appellees. Appellees moved to dismiss the appeal insofar as directed to the order denying summary judgment in favor of appellants, filed counterpoints in answer to the points of error asserted by appellants, and present cross-assignments directed to the asserted error of the trial court in sustaining the exceptions above mentioned. Appellants in their brief have conceded that the order denying their motion for summary judgment is interlocutory and not appealable, which concession disposes of the appellees' motion to dismiss that portion of the appeal. The appeal as now presented to this Court is from the order granting summary judgment in favor of appellees, and by cross-assignment, from the action of the trial court in sustaining the exceptions to appellees' petition.

"Appellee Markham is a licensed attorney, and appellee Gibbard is a licensed real estate dealer in the State of Texas." They alleged that on or about August 10, 1951, appellee Markham had a client desirous of purchasing an industrial plant site in Harris County; that he wrote to

appellant R. O. Burchfield & Brother in Houston, describing generally the type of site desired, and stating: "A licensed real estate dealer working for my client will expect to share in the commission equally with the local broker or agent." That appellants provided a site suitable to the purchasers and a sale was consummated about Nov. 13, 1951. That as a result of the sale, a commission in the amount of $9,722.97 became due and payable. That appellees asserted their claim for one-half of such commission to the sellers, who, after paying one-half thereof to appellants, tendered the remaining one-half into the registry of the court under a bill of interpleader. Between the date of the letter from Markham to appellants on August 10, 1951, and the final consummation of the sale, certain telephone conversations and correspondence took place between Markham and appellants. The exact words spoken during such conversations, and their effect, are disputed by the parties, it being appellees' contention, however, that under any construction, they, together with the letters, constituted a contract between appellees and appellants upon which the summary judgment rendered in their favor should be supported.

[1, 2] "Appellants, in view of the concession above mentioned, complain only of the action of the trial court in granting summary judgment against them. We feel that their point presenting such asserted error is well taken and should be sustained. By deposition the record affirma-

tively shows that appellee Gibbard had no interest in th lawsuit, claimed no right to the recovery sought, and ha allowed his name to be used as a party plaintiff only a an accommodation to appellee Markham. Therefore, the undisputed facts, rather than supporting the judgment in his favor, conclusively negative his right to recovery, and the judgment in his favor is clearly erroneous. As to appellee Markham, appellants have plead first that they made no contract, and alternatively that any contract, if made, obligated them to share their commission only with a licensed real estate dealer, which appellee Markham admittedly is not. The facts and circumstances surrounding the transactions between the parties are disputed, and must be ascertained before their legal effect can be determined. The existence of any genuine issue of fact prevents the granting of summary judgment. Bolton v. Foreman, Tex. Civ.App., 263 S. W.2d 618.

"We are unable to agree with appellants' contention that any contract between appellants and Markham to share a commission is void and unenforceable as being violative of the provisions of Art. 6573a, Revised Civil Statutes of Texas." That statute is one defining real estate dealers, requiring licenses of persons or companies engaging in the real estate business as dealers, and providing penalties for violations of its provisions. The particular provision upon which appellants rely is contained in Section 20, which reads as follows: "It shall be unlawful for any real estate

dealer or real estate salesman to offer, promise, allow, give or pay directly or indirectly any part or share of his commission or compensation arising or accruing from any real estate transaction, to any person who is not a licensed dealer or salesman, in consideration of service performed or to be performed by such unlicensed person, and no real estate salesman shall be employed by or accept compensation from any person other than the dealer under whom he is at the time licensed; and it shall be unlawful for any licensed real estate salesman to pay a commission to any person except through the dealer under whom he is at the time licensed. Acts 1949, 51st Leg., p. 304, ch. 149, § 1."

An examination of the entire act discloses the following additional pertinent provisions: "Sec. 2. The following terms shall, unless the context otherwise indicates, have the following meanings: (a). (1). The term 'Real Estate Dealer' shall include every person or company, other than a salesman, and licensed and registered attorneys, * * *." Section 3 of the act reads as follows: "Sec. 3. The provisions of this Act shall not apply to, and the terms 'Real Estate Dealer' and 'Real Estate Salesmen,' as above defined, shall not include: * * *. (b). Persons acting as an attorney in fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate; services rendered by an attorney at law, receiver, trustee in bankruptcy, administrator, or

executor, or any person doing any of the acts specified in Section 2, Subdivision (a) of this Act under order of any court; a trustee acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof."

[3, 4] The act is penal in its nature. As such it must be strictly construed. When so construed, Section 20 cannot be held to have the effect of denying a right to a person in whom such right existed at common law, and who appears to this Court to have been expressly excluded from the applicable provisions of the entire act.

[5, 6] We overrule appellees' cross-assignments. Art. 2226 provides for the recovery of attorney's fees by any person having a valid claim for personal services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express or stock killed or injured. This is a suit for alleged breach of contract for the payment of money, and clearly does not fall within the provisions of the cited statute. A. L. Carter Lumber Co. v. Saide, 140 Tex. 523, 168 S. W. 2d 629, by the Texas Supreme Court, seems to be ample authority for the proposition that is not such a case as gives rise to a claim for exemplary damages.

Reversed and remanded.

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Galveston on the 1st

Monday of October, A. D. 1953, present W. P. HAMBLEN, JR., Chief Justice, and Associate Justices GEO. W. GRAVES and T. H. CODY.

In the cause

R. O. BURCHFIELD ET AL,

Appellants,

No. 12,711

vs.

From District Court of Harris County
Tr. Ct. #403,642
Opinion by.....

E. L. MARKHAM, JR., ET AL,

Appellees,

the following orders were entered on:

April 1, 1954:

"It is ordered, on the Court's own motion, that appellees' motion to dismiss the appeal herein be and the same hereby is taken with the case."

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Galveston on the 1st Monday of October, A. D. 1953, present W. P. HAM-

BLEN, JR., Chief Justice, and Associate Justices GEO. W. GRAVES and T. H. CODY.

In the cause

R. O. BURCHFIELD ET AL,

Appellants,

No. 12,711

vs.

From District Court of Harris County
Tr. Ct. #403,642
Opinion by HAMBLEN, CJ

E. L. MARKHAM, JR., ET AL,

Appellees,

the following judgment was rendered April 22, 1954:

"This cause, being an appeal from the judgment rendered and entered by the court below on December 8, 1953, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this Court; that the appellees, E. L. Markham, Jr., and Larry Gibbard, jointly and severally, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX C

R. O. BURCHFIELD et al., Appellants,

v.

E. L. MARKHAM, Jr., et al., Appellees.

No. 12928.

Court of Civil Appeals of Texas.

Galveston.

Feb. 16, 1956.

Rehearing Denied March 8, 1956.

Action by attorney and realty broker against realty broker and a realty brokerage partnership for share of a commission accruing from sale of land. The District Court, Harris County, G. P. Hardy, Jr., J., entered judgment for attorney and defendants appealed. The Court of Civil Appeals, Gannon, J., held that where trial court submitted to jury the component elements of a contractual arrangement relied on by attorney for recovery of a share of realty commission in question, attorney's failure to request and court's failure to submit a question to jury expressly inquiring as to whether or not defendants had agreed to share the commission in controversy with attorney was not an abandonment of attorney's case.

Judgment affirmed.

See also, 267 S.W.2d 866.

1. Brokers—Key No. 66

Agreement between attorney who was not licensed realty dealer and licensed realty brokers to share a commission

accruing from the sale of certain realty, was not void or unenforceable. Vernon's Ann.Civ.St. art. 6573a, § 26.

2. Costs—Key No. 173(1)

Action by attorney for share of a commission accruing from sale of land, allegedly due under an agreement entered into by attorney and certain realty brokers, did not fall within statute providing for recovery of attorney's fees by person having a valid claim for personal services rendered or labor done. Vernon's Ann.Civ.St. art. 2226.

3. Trial—Key No. 351(2)

Where trial court submitted to jury some of the component elements of a contractual arrangement relied on by attorney for recovery of a share of a realty commission, attorney's failure to request and court's failure to submit a question to jury expressly inquiring as to whether or not realty brokers had agreed to share commission in controversy with attorney was not an abandonment of attorney's case Rules of Civil Procedure, rule 279.

4. Brokers—Key No. 88(14)

Where attorney sued for commission on theory that he and realty brokers had agreed that a licensed realty dealer was to be nominated by attorney as a dummy or strawman to receive attorney's share of a commission for sale of realty, finding by jury that realty brokers agreed to share the commission with a licensed realty dealer to be nominated by attorney did not negative attorney's theory and

did not preclude his recovery, in view of jury finding that attorney nominated a licensed realty dealer in accordance with the parties' agreement.

5. Estoppel—Key No. 107

Where attorney in action for share of commission accruing from sale of land alleged that realty brokers knowingly accepted a prospective purchaser referred to them by attorney under an agreement in which attorney was to receive one-half of the commission, and they realized a commission from a sale to such prospective purchaser, complaint alleged a sufficient basis for an equitable estoppel, against realty brokers.

6. Pleading—Key No. 4

Courts look to the substance of pleadings rather than to their technical designation by the pleader.

George Red and Pat N. Fahey, Houston, for appellants.

Curtis E. Hill, Dallas, for appellees.

GANNON, Justice.

This is a suit by E. L. Markham, Jr., a licensed attorney of the Dallas Bar, joined by Larry Gibbard, a licensed real estate dealer, against R. O. Burchfield, individually, and W. G. Burchfield, & Bro., a real estate brokerage partnership composed of W. G. Burchfield, R. O. Burchfield and R. H. Burchfield, to recover one-half of a real estate commission paid the defendant partnership as brokerage

for the sale of a deep water plant site to Heyden Chemical Corporation. Each of the members of the defendant partnership is a licensed real estate dealer.

After a trial before a jury and upon the coming in of a special issue verdict, judgment was rendered against defendants and in favor of plaintiff Markham in the amount sued for. It was decreed that plaintiff Gibbard, who in effect disclaimed, take nothing. Defendants appeal.

The gist of the plaintiffs' pleading and proof is: plaintiff, E. L. Markham, Jr., was in touch with Heyden Chemical Corporation which desired to purchase a deep water plant site on the Gulf Coast in either Beaumont, Corpus Christi, or Houston; Heyden Chemical Corporation had enlisted the services of plaintiff, E. L. Markham, Jr., to aid and assist it in securing such plant site, apparently on the understanding that Markham's compensation for his services was to be realized by sharing with the brokers representing the potential vendor the brokerage commission which it was contemplated would be paid by such vendor; acting under such understanding with his principal, Heyden Chemical Corporation, Markham, on or about August 10, 1951, wrote identical letters to several real estate brokerage concerns, including the defendant partnership, making inquiry in regard to the availability of a desirable site; the letter included the following: "A licensed real estate dealer working for my cilents would expect to share in the commission equally with the local broker or agent"; in response to such letter, and on August

13, 1951, R. O. Burchfield, of the defendant partnership, called plaintiff Markham at Dallas by long distance from Houston for further details and to advise Markham of what his firm thought would be available; in the conversation Markham, evidently referring to the above quoted sentence in his letter of August 10, 1951, stated he understood that a licensed real estate dealer would work with other dealers but not with lawyers; Burchfield stated that was correct; whereupon Markham stated, "I said I do not think it is illegal for a lawyer to transact real estate business but in order to set this adide (sic) [up] I will name a licensed real estate dealer." Following the telephone call of August 13, 1951, R. O. Burchfield, acting for the partnership, wrote Markham referring to Markham's letter of August 10th and to the long distance telephone conversation and detailed the situation in respect to available sites as it was known to Burchfield. This letter concludes, "As soon as we can tell you something definite, we will write you. In the meantime if your parties desire to inspect any of the sites which we have to offer, we will be very glad to take care of them to the best of our ability.

"With best wishes and hoping that we will be able to transact some nice business as a result of *our association*, we are." Markham testified that in the long distance conversation of August 13, 1951, he, Markham, made it known to Burchfield that Markham was the person to get a share of the real estate commission through Mr. Gibbard. After the long distance telephone conversation and exchange of

correspondence, Markham placed an officer of his corporate principal in touch with Burchfield; negotiations ensued, and resulted in the purchase by Heyden Chemical Corporation from Burchfield's principals of a plant site. From this sale Burchfield realized a commission of $9,722.97, one-half of which, or $4,858.65, was awarded plaintiff Markham by the trial court's judgment. As stated in the long distance conversation, according to Markham's testimony, it was made known to Burchfield that Markham was the person to get a share of the real estate commission through Gibbard, Markham promising, however, to "window dress" the transaction, as it were, by naming a licensed real estate dealer to stand in for him, which proposal was acceptable to Burchfield.

The defendants answered by numerous special exceptions and other pleas, asserting as a defense that since plaintiff, E. L. Markham, Jr., was not licensed as a real estate dealer under the provisions of Article 6573a et seq., V.A.T.S., he was not one with whom defendants could lawfully contract for a share in the commission involved. Responding further to the merits the defendants plead receipt of Markham's letter of August 10, 1951, wherein it is stated that a licensed real estate dealer working for Markham's clients would expect to share in the commission equally with the local broker or agent and set up that such provisions of the letter constituted a material representation which induced the defendants to attempt to negotiate the transaction out of which the suit grew, but for which representa-

tion defendants would not have gone ahead; that for defendants to share a commission with an attorney at law not actually a licensed real estate dealer would be unlawful and would operate to damage and prejudice defendants, etc. In short, that the active and substantial participation of a licensed real estate dealer who would take the one-half share of the commission as his own was of the essence of the understanding with Markham.

It is undisputed that no licensed real estate dealer named by Markham ever actually participated in any negotiations. It is also undisputed that at or about the time the real estate transaction, out of which the commission grew, was to be closed, the co-plaintiff, Larry Gibbard, who is a licensed real estate dealer, agreed to stand in for E. L. Markham, Jr., in order to enable Markham to carry out his claimed arrangement with defendants. And that Gibbard furnished Markham with a letter addressed to defendants reciting that he, Gibbard, had been in touch with E. L. Markham, Jr., relative to the Heyden Chemical Corporation purchase during the past several weeks and that he, Gibbard, would be happy to work with Markham "and with you in the consummation of this deal." The letter advised of Gibbard's inability to be present at the closing of the deal on Monday, November 12, 1951, but that Markham would be there. The letter includes an appointment by Gibbard of Markham as Gibbard's agent and attorney to transact Gibbard's part of the transaction and authorized the defendants to pay one-half of the commission direct to Markham.

After a jury trial, the case was submitted on special issues, which, together with the jury's answers, are as follows:

Special Issue No. 1

"Do you find from a preponderance of the evidence that in the exchange of letters and telephone conversation had between R. O. Burchfield and E. L. Markham, Jr., R. O. Burchfield agreed with E. L. Markham, Jr., to work with a licensed real estate dealer to be later nominated by E. L. Markham, Jr." To which the jury answered "We do."

Special Issue No. 2

"Do you find from a preponderance of the evidence that at the time in question a universal custom existed in the real estate trade in Dallas County, Texas and Harris County, Texas, under which the term 'Work with' where used between two persons dealing in real estate were one provided the purchaser and the other provided the seller for a contemplated real estate sales and purchase transaction, meant an agreement to equally share the commission from such real estate transaction?" To which the jury answered "We do."

Special Issue No. 3

"Do you find from a preponderance of the evidence that at the time in question R. O. Burchfield knew of the custom inquired about in Special Issue No. 2?" To which the jury answered "We do."

Special Issue No. 4

"Do you find from a preponderance of the evidence that at the time in question E. L. Markham, Jr., knew of the custom inquired about in Special Issue No. 2?" To which the jury answered "We do."

Special Issue No. 5

"If you have answered Special Issue No. 3 'We do not' and only in that event, then answer:

"Do you find from a preponderance of the evidence that at the time in question E. L. Markham, Jr., did not know that R. O. Burchfield had no knowledge of such custom inquired about in Special Issue No. 3?" To which there was no answer.

Special Issue No. 6

"Do you find from a preponderance of the evidence that in the exchange of letters and telephone conversation had between R. O. Burchfield and E. L. Markham, Jr., R. O. Burchfield agreed with E. L. Markham, Jr., to share equally with a licensed real estate dealer to be later nominated by E. L. Markham, Jr., the real estate commission from the real estate transaction contemplated in such exchange of letters and telephone conversation?" To which the jury answered "We do."

Special Issue No. 7

"Do you find from a preponderance of the evidence that the said E. L. Markham, Jr., did later nominate a licensed real estate dealer as he agreed to do in the exchange of letters and telephone conversation had between R. O. Burchfield and E. L. Markham, Jr.?" To which the jury answered "We do."

Special Issue No. 8

"Do you find from a preponderance of the evidence that E. L. Markham, Jr., was the procuring cause of the real estate sale in question from Frank Liddell and others as sellers to Heyden Chemical Corporation as purchaser?" To which the jury answered "We do."

Special Issue No. 9

"Do you find from a preponderance of the evidence that after the occasion on August 20, 1951 when Simon Askin first contracted and conferred with R. H. Burchfield in Houston, Texas, concerning the real estate transaction in question that R. H. Burchfield knew that Simon Askin for Heyden Chemical Corporation was placed in contact with R. H. Burchfield by E. L. Markham, Jr., concerning the transaction in question." To which the jury answered "We do."

Special Issue No. 10

"Do you find from a preponderance of the evidence that the defendants Burchfields' derived a benefit from Simon Askin contacting them, the Burchfields?" To which the jury answered "We do."

Special Issue No. 11

"Do you find from a preponderance of the evidence that the defendants Burchfields, after having such knowledge inquired about in Special Issue No. 9, received and accepted such benefit, if any you have found, as inquired about in Special Issue No. 10?" To which the jury answered "We do."

Special Issue No. 12

"Do you find from a preponderance of the evidence that plaintiff, E. L. Markham, Jr., led defendants to believe that a licensed real estate dealer, working for E. L. Markham, Jr.'s clients, would work with and cooperate with defendants in selling a plant site to Markham's clients?" To which the jury answered "We do not."

Special Issue No. 13

"Do you find from a preponderance of the evidence that defendants acted as they did, relying on the belief that a licensed real estate dealer working for E. L.

Markham, Jr.'s clients, would work with and cooperate with the defendants in selling a plant site to Markham's clients?" To which the jury did not answer. (This special issue was to be answered only in the event the next preceding Special Issue was answered in the affirmative)

Special Issue No. 14

"Do you find from a preponderance of the evidence that E. L. Markham, Jr., failed to nominate a licensed real estate dealer who worked and cooperated with defendants in selling a plant site in question to Heyden Chemical Corporation?" To which the jury answered "We do not."

Special Issue No. 15

"Do you find from a preponderance of the evidence that defendants suffered injury by reason of the failure of E. L. Markham to nominate a licensed real estate dealer to work and cooperate with defendants in selling a plant site to Heyden Chemical Corporation." To which the jury did not answer. (This special issue was to be answered only in the event the next preceding special issue was answered in the affirmative)

Special Issue No. 16

"Do you find from a preponderance of the evidence that at the time and on the occasion in question E. L. Markham, Jr., was acting in his professional capacity as an attorney-at-law?" To which the jury answered "He was not."

Special Issue No. 17

"Do you find from a preponderance of the evidence that at the time and on the occasion in question E. L. Markham, Jr., was acting as a real estate dealer?" To which the jury answered "He was not."

Unless considered in relation to the pleadings and the proof, the verdict appears ambiguous, if not conflicting. However, when applied to the pleadings and proof, and the window dressing arrangement testified to by plaintiff Markham, it seems to us that such ambiguity and apparent conflict is dissolved. At any rate, no point is made of possible conflict and, therefore, we do not further concern ourselves with it. Especially since defendants affirmaitvely rely on the verdict as a clear, unambiguous, non-conflicting establishment of their version of the facts.

The case is brought here by appellants on substantially four points, which are (1) Since Gibbard was only a straw man and stand-in for Markham, who though an attorney was still not a licensed real estate dealer, the contract relied on is unenforceable because violative of Section 26 of art. 6573a, V. A. T. S., (2) the plaintiff abandoned his case when he failed to request and the court did not submit directly and in express terms "whether or not R. O. Burchfield and/or W. G. Burchfield & Bro. had agreed to share the commission in controversy with E. L. Markham, Jr., (3) the finding of the jury on special issue No. 6 conclusively establishes defendants' version of the true arrangement with Markham and entitled them to judgment, and (4) the court erred in overruling and in not sustaining special exceptions to the petition wherein plaintiffs in effect plead an estoppel against defendants to deny liability, setting up that plaintiff Markham furnished the purchaser and was the procuring cause of the sale and that defendants, knowing Markham expected to be compen-

sated by one-half of the commission and knowing that the purchaser had been directed to defendants by Markham, treated and dealt with the purchaser and effected a sale to it and thereby realized the commission in controversy as a result of Markham's efforts because there was no allegation of any false representation by defendants.

By cross-assignment, the plaintiff Markham complains of our ruling on a prior appeal holding inapplicable art. 2226, V. A. T. S., providing for the recovery of attorney's fees on successful prosecution of certain classes of claims.

We overrule all points of error, including appellees' cross-point.

[1, 2] Appellants' first point and appellees' cross-point are ruled by the opinion on the former appeal, Burchfield v. Markham, Tex. Civ. App., 267 S. W. 2d 866, writ refued, n. r. e., to which we adhere.

In connection with appellants' second point, it does not appear that there was any objection to the court's submission for incompleteness, that is to say for failure to submit all the component elements of the contractual arrangement relied upon by plaintiff as a basis of recovery. Appellant cites the following from Rule 279, T. R. C. P.: "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; * * *" but does not cite the remainder of the sentence from which the quotation is lifted. The sentence in its entirety reads as follows: "Upon appeal all independent

grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if *one or more* of the issues necessary to sustain such ground of recovery or of defense, and *necessarily referable thereto*, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, *but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment.*"

[3] The trial court was not requested to file written findings in support of the judgment. If, therefore, one or more of the issues actually submitted by the court is necessarily referable to the contractual agreement, relied on by Markham, we must deem any and all omitted issue or issues to have been found by the court in such manner as to support the judgment. We think it obvious from the charge considered as a whole that one or more of the issues actually submitted is referable to the contractual arrangement or understanding relied upon by plaintiff Markham as a basis for recovery and are unable to agree with appellants that the submission of the case evidences a complete abandonment by plaintiff of his asserted right to recover under

his claim of contract. The following special issues obviously relate to the contractual arrangements and to nothing else: Special Issues Nos. 1, 2, 3, 4, 6, 7, 12, 13, and 14. In the light of the complete provisions of Rule 279, we are unable to find an abandonment by Markham of his claimed right of recovery based on Burchfield's promise or agreement to divide commissions with him, which was, of course, one of the controlling ultimate issues in the case, if not the only one. Wichita Falls & O. R. Co. v. Pepper, 1940, 134 Tex. 360, 135 S. W. 2d 79, relied on by appellants under this point is thought to be fully in harmony with Rule 279. If not, the case has been superseded by the rule.

[4] Coming to appellants' claim that they were entitled to judgment on the answer of the jury to Special Issue No. 6, finding that defendants agreed "to share equally with a licensed real estate dealer to be nominated later by E. L. Markham, Jr., the real estate commission from the real estate transaction contemplated" in the letters and telephone conversation—we cannot agree with appellants' contention since we feel, as above stated, that when applied to the conflicting testimony and read in the light of the jury's answer to Special Issue No. 7, finding that Markham "did later nominate a licensed real estate dealer as he agreed to do * * *," it becomes apparent that the jury sustained Markham's version of the understanding arrived at in the exchange of letters and the long distance telephone conversation, to wit: that the licensed real estate dealer to be nominated by Markham was but a dummy or straw man

to give the transaction the appearance of one in which the defendants had worked—not with a lawyer—but with another licensed real estate dealer. Surely the verdict is incapable of the construction, as claimed by appellants, that it establishes the essence and substance of the understanding to be that only a licensed real estate dealer to be nominated by Markham was to be eligible for a beneficial interest in the commission money.

[5, 6] Coming finally to appellants' point that the pleadings did not set up an estoppel because they failed to allege any false representation or concealment of material facts on the part of defendants—we have carefully considered the pleading and are of the opinion that it sufficiently alleges conduct on the part of defendants which induced plaintiff Markham to refer the prospective purchaser to the Burchfields at a time and under circumstances when the defendants realized Markham expected to be compensated by one-half of the commission should he furnish such purchaser. In our opinion, these and other allegations pleading that the defendants knowingly accepted Markham's prospect and realized a commission from a sale to such prospect allege a sufficient basis for an equitable estoppel. If, as may be, the allegations plead no more than an implied contract, we see no harm to appellants. Courts look to the substance of pleadings rather than to their technical designation by the pleader.

The judgment is affirmed.

BE IT REMEMBERED:

That at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Galveston on the 1st Monday of October, A. D. 1955, present W. P. Hamblen, Jr., Chief Justice, and Associate Justices T. H. Cody and G. G. Gannon.

In the cause

R. O. BURCHFIELD ET AL, Appellants,

No. 12,928

vs.

From District Court of Harris County
Tr Ct # 403,642
Opinion by Gannon, J

E. L. MARKHAM, JR., ET AL, Appellees,

the following judgment was rendered February 16, 1956:

"This cause, being an appeal from the judgment rendered and entered by the court below on April 16, 1955, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellants, R. O. Burchfield and W. G. Burchfield & Bro., pay all costs in this cause incurred. It is further ordered that this decision be certified below for observance."

APPENDIX D

R. O. BURCHFIELD et al., Petitioners,

v.

E. L. MARKHAM, Jr., et al., Respondents.

No. A-5787.

Supreme Court of Texas.

Oct. 31, 1956.

Rehearing Denied Nov. 28, 1956.

Action by attorney against realty broker for a share of commission accruing from sale of land. The District Court, Harris County, G. P. Hardy, Jr., J., entered judgment for attorney and broker appealed. The Galveston Court of Civil Appeals, First Supreme Judicial District, Gannon, J., 287 S. W. 2d 733, affirmed, and broker brought error. The Supreme Court, McCall, J., held that under the old Real Estate Dealers License Act declaring it unlawful for any real estate dealer to pay, directly or indirectly, any part or share of his commission accruing from real estate transaction to any person who is not a licensed dealer, contract between an attorney and real estate broker providing for splitting of commission was invalid, notwithstanding provision in Act specifically exempting attorneys from the Act.

Reversed and rendered.

1. Brokers—Key No. 42

Under the old Real Estate Dealers License Act declaring it unlawful for any real estate dealer to pay, directly or

indirectly, any part or share of his commission accruing from a real estate transaction to any person who is not a licensed dealer, contract between attorney and real estate broker providing for splitting commission on sale of land was invalid, notwithstanding that by another provision of the Act attorneys were exempt from the provisions of the Act. Vernon's Ann. Civ. St., art. 6573a, §§2, 2(a) (1), 3, 3(b), 11, 11(5), 20.

2. Appeal and Error—Key No. 1097(1)

Where Court of Civil Appeals reversed and remanded summary judgment granted in trial court and stated there were disputed facts that must be tried, statements made in course of decision respecting validity of contract could not be considered as law of case in subsequent appeal and as binding on Supreme Court that had refused application for writ of error on first appeal.

George Red and Pat N. Fahey, K. D. Keenan, Houston, for petitioners.

Curtis E. Hill, Dallas, for respondents.

McCALL, Justice.

Basically this is a suit brought by E. L. Markham, Jr. against R. O. Burchfield to recover one half of the commission earned by Burchfield on the sale of a tract of land to a purchaser procured by Markham. Markham is an attorney at law licensed to practice in Texas. Burchfield is a real estate dealer, who was licensed under the old Real

Estate Dealers License Act, Article 6573a, Vernon's Ann. Civ. St. In 1951 Markham had a client, Heyden Chemical Corporation, which desired to purchase a deep water plant site on the Gulf Coast in Texas. This corporation requested Markham to help it locate a site with the understanding that he would get all compensation expected for his services by sharing the commission of the real estate dealer who negotiated the land sale. With this understanding Markham wrote Burchfield, who, according to the finding of the jury, agreed to locate such a site for Heyden Chemical Corporation and to split the commission with Markham, if the latter would nominate some licensed real estate dealer of his choice to stand in for him and receive for him his half of the commission. This subterfuge was intended to allow Burchfield to split the commission with Markham without raising any question as to violation of the Real Estate Dealers License Act. Burchfield found the site. Markham supplied the purchaser, who bought the site and paid a commission of $9,722.97. Markham then named a licensed real estate dealer, Larry Gibbard, to receive his half of the commission, but Burchfield refused to pay, claiming that under the Texas Real Estate Dealers License Act it was unlawful for him to split his commission with anyone who was not a licensed real estate dealer or salesman.

The trial court rejected Burchfield's contention and after trial by jury gave judgment for Markham. This judgment was affirmed by the Court of Civil Appeals, 287 S. W. 2d 733, in an opinion which relates the evidence and the jury findings in greater detail than here set forth.

[1] The question in this cause is whether under the Real Estate Dealers License Act, Article 6573a, V.A.C.S., a real estate dealer licensed thereunder may lawfully contract to split his commission with an attorney at law who has procured a purchaser for a sale. The Real Estate Dealers License Act was rewritten in 1955 and designated The Real Estate License Act, but this case is controlled by the old Act as it existed in 1951, the pertinent provisions of which were as follows:

> Section 2(a) (1). "The term 'Real Estate Dealer' shall include every person or company, other than a salesman, and licensed and registered attorneys, who for another or others for compensation or other valuable consideration, or who with the intention or in the expectation or upon the promise of receiving or collecting compensation or other valuable consideration, lists for sale, sells, exchanges, buys, * * * or assists or directs in the procuring of prospects, or the negotiation or closing of any transaction which does or is calculated to result in the sale * * * of any real estate * * *.
>
> * * * * * * *
>
> "Sec. 3. The provisions of this Act shall not apply to, and the terms 'Real Estate Dealer' and 'Real Estate Salesman', as above defined, shall not include:
>
> * * * * * * *
>
> "(b). Persons acting as an attorney in fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate; services rendered by an attorney at law, receiver, trustee in bankruptcy, administrator, or executor, or any person doing any of the acts specified in Section 2, Subdivision (a) of this Act under order of any court; a trustee acting under a trust agree-

ment, deed of trust, or will, or the regular salaried employees thereof.

* * * * * * *

"Sec. 20. It shall be unlawful for any real estate dealer or real estate salesman to offer, promise, allow, give, or pay directly or indirectly any part or share of his commission or compensation arising or accruing from any real estate transaction to any person who is not a licensed dealer or salesman in consideration of service performed or to be performed by such unlicensed person * * *."

Section 11 provided that the license of a real estate dealer may be revoked if he "(5) Paid commissions or fees to, or divided commissions or fees with anyone not licensed as a real estate dealer or salesman * * *."

Section 21 provided for a penalty of not more than $500 or imprisonment in the county jail for not more than one year or both such fine and imprisonment for anyone convicted of wilfully violating any provision of the Act.

Markham contends that as an attorney at law he was exempted from the Act. Burchfield contends that the only exemption an attorney at law had under the Act was while acting his capacity as an attorney, and the jury found Markham was not so acting in this instance. It is true that if the provision in Section 3 is considered alone, only the "services rendered by an attorney at law * * * under order of any court" seem to be exempted. But this ignores the effect of Section 2 of the Act, wherein numerous acts were listed and it was provided that anyone who did any one of these acts should be considered as being a real estate dealer,

and should be licensed as such; unless he was employed by a licensed real estate dealer, and then he should be licensed as a real estate salesman; or unless he was a licensed and registered attorney at law. Receivers, trustees in bankruptcy, administrators, executors, and others, including attorneys, were mentioned in Section 3 as exempt when doing certain specified acts. But only licensed and registered attorneys at law were mentioned with real estate dealers and real estate salesmen in Section 2 which listed all the acts which constitute real estate practice.

However, even if an attorney was exempted under Section 2 from the necessity of procuring a license as a dealer or salesman, the fee-splitting contract in this case was still not lawful. By Sections 11 and 20 it was declared unlawful for either a real estate dealer or salesman to split a commission except with another licensed dealer or salesman. Perhaps attorneys at law were exempt from the Act, but real estate dealers and salesmen certainly were not. They were closely regulated by the Act. Among other regulations it was provided that their licenses could be revoked if they divided a commission with anyone not a licensed dealer or salesman. An attorney at law is neither a licensed dealer or salesman. Attorneys were specifically mentioned with dealers and salesmen in Section 2, but only dealers and salesmen were named in Sections 11 and 20 as being allowed to divide commissions. It seems clear that under these provisions the contract between Burchfield, a licensed real estate dealer, and Markham, a licensed attorney, to split the commission received by Burchfield was unlawful and

unenforceable. Gregory v. Roedenbeck, 141 Tex. 543, 174 S. W. 2d 585.

[2] Respondent Markham contends that this appeal is governed by the law of the case as established in a former appeal in this case, Burchfield v. Markham, Tex. Civ. App., 267 S. W. 2d 866 (refused, n. r. e.). This was an appeal from a summary judgment for Markham against Burchfield for one half of the commission here involved. While the Court of Civil Appeals does state in its opinion that under its interpretation of the Real Estate Dealers License Act a contract to divide a commission between an attorney at law and a real estate dealer was lawful, it was not shown in the summary judgment proceeding just what the facts were in the case. As the Court of Civil Appeals stated, "The facts and circumstances surrounding the transactions between the parties are disputed, and must be ascertained before their legal effect can be determined. The existence of any genuine issue of fact prevents the granting of summary judgment." 267 S. W. 2d 866, 867. By refusing the application for writ of error with the notation of "no reversible error" the Supreme Court approved only the result reached by the Court of Civil Appeals and not the statements as to the law in the opinion. Let us assume that the Supreme Court on this first appeal did conclude that the contract was unlawful and that Markham had no valid cause of action. Like the Court of Civil Appeals all the Supreme Court could do was reverse and remand the cause for trial on its merits. Neither court could have reversed and rendered the cause, thereby granting a summary judgment to

Burchfield. The trial court had refused to grant Burchfield a summary judgment, and this interlocutory order could not be appealed. Under the above facts it cannot be held that these statements of the Court of Civil Appeals setting forth its interpretation of the Act is the "law of the case" binding on this Court. Connecticut General Insurance Co. v. Bryson, 148 Tex. 86, 219 S. W. 2d 799.

The judgment of the trial court and the Court of Civil Appeals is reversed and judgment is rendered for petitioners.

IN THE SUPREME COURT OF TEXAS

No. A-5787

R. O. Burchfield, et al.

vs.

E. L. Markham, Jr., et al.

October 31, 1956

From Harris County, First County

This cause came on to be heard on writs of error to the Court of Civil Appeals for the First Supreme Judicial District, and the original transcript as well as transcript showing the proceedings had in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgments of the courts below, it is therefore *ordered, adjudged* and *decreed* that the judgments of the District Court and Court of Civil Appeals be, and are hereby, reversed and set aside.

And this Court proceeding to render judgment as should have been rendered below, it is *considered, adjudged, ordered* and *decreed* that respondents (plaintiffs), Larry Gibbard and E. L. Markham, Jr., and (intervenors), Frank A. Liddel, Paul Kayser and Ida P. Huggins, a feme sole, do have and recover nothing of and from petitioners, (defendants) R. O. Burchfield and W. G. Burchfield and Brother, a partnership composed of R. O. Burchfield and R. H. Burchfield, by their suit herein, but that the said petitioners, R. O. Burchfield and W. G. Burchfield and

Brother, a partnership composed of R. O. Burchfield and R. H. Burchfield, go hence without day and have and recover of and from respondent, E. L. Markham, Jr., all costs in this behalf expended in this Court, the Court of Civil Appeals and District Court, and that this decision be certified to the District Court of Harris County, Texas, for observance.

APPENDIX E

Rule 166-A. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken

or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Promulgated by order of October 12, 1949, effective March 1, 1950. As amended by order of October 10, 1951, effective March 1, 1952.

New rule, effective March 1, 1950.

Source: Federal Rule 56, as originally promulgated, except that the following wording in subdivision (a) has been eliminated: "pleading in answer thereto has been served"; and in its place the following language has been substituted: "adverse party has appeared or answered."

Change by amendment effective March 1, 1952: The last sentence is added to paragraph (a).

Author's Comments

Source of Rule

Certain amendments were made in Federal Rule 56 on December 19, 1947, effective March 19, 1948. Subd. (a) now permits a motion "at any time after the expiration of 20 days from the commencement of the action or after the service of a motion for sum-

mary judgment by the adverse party." To subd.
there has been added: "a summary judgment, int
locutory in character, may be rendered on the is
of liability alone although there is a genuine issue
to the amount of damages." And subd. (d) has b
changed to indicate clearly that a partial summ
"judgment" is not a final appealable judgment unl
appeal is authorized by a specific statute. See R
56, 28 U. S. C. A. and notes.

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No. 939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

E. L. MARKHAM, JR., ET AL., *Petitioners*

v.

R. O. BURCHFIELD, ET AL., *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

R. O. Burchfield, individually, and W. G. Burchfield & Bro., a partnership composed of R. O. Burchfield and R. H. Burchfield, oppose the granting of a Writ of Certiorari for the reasons hereinafter stated.

Statement

The statement of the case beginning on page 6 of E. L. Markham, Jr.'s Petition seems fair from Petitioners' standpoint, except that it does not state the contention of Re-

spondents in all the courts, to-wit, that Respondents agreed only that they would work and cooperate with a licensed real estate agent as allowed by the laws of the State of Texas and did not agree to compensate E. L. Markham, Jr.

Jurisdiction

Respondents submit that this Honorable Court has no jurisdiction of this case unless the Constitution of the United States is violated by the Real Estate Dealers' License Act as construed and applied by the Supreme Court of Texas.

Question Presented

Whether the Real Estate Dealers' License Act as construed by the Supreme Court of Texas denies to E. L. Markham, Jr. any of his rights under the Constitution of the United States as interpreted and applied by this Honorable Court.

Argument

On page 8 of the Petition of E. L. Markham, Jr. he says:

> "The questions, therefore, are:
>
> "First, whether the Supreme Court of Texas in its decision and judgment that the agreement involved was unlawful and unenforceable under certain provisions of the Real Estate Dealers License Act, ascribed to such statutes a meaning that the Legislature of the State of Texas could not possibly have intended, and if so,
>
> "Second, whether its action in so construing and applying such statutes violated any of petitioner's federal rights and deprived him of benefits thereunder."

On page 9 of his Petition, Petitioner correctly quotes the statute involved here. We take it that if the Supreme Court of Texas has, in this case, correctly construed such statute, then it is Petitioners' contention that the application of the statute violates his federal rights and deprives him of benefits.

As early as 1943, about four years after the statute was enacted, the Supreme Court of Texas, in the case of *Gregory v. Roedenbeck,* 141 Tex. 543; 174 S.W. 585, applied the statute to a case involving facts similar to if not exactly like the facts of this case and held:

> "Section 20 prohibits any dealer or salesman from paying any part of his commission to a person who is not licensed under the Act, in consideration of service. The language used is plain and unambiguous. In this instance Roedenbeck initiated the transaction. He was the moving factor in the deal. Admittedly he was an unlicensed person, and it can hardly be contended that the furnishing of the name of a prospective purchaser did not amount to a service performed. He entered into a purported contract for one-half of the commission to be paid. He was vitally and materially interested in the consummation of the sale of the land. He claimed for his services one-half of the commission to be paid for the consummation of the deal. Under these facts he came under the provisions of the Act.
>
> "We hold that the enactment of the Real Estate Dealers' License Act, regulating those who may make sales of real estate, was a proper exercise of the police power of the State, and that the Act is valid.
>
> "We further hold that the performance for compensation of one act by a person, in connection with the procurement of a prospect for the sale or purchase of real estate, constitutes such person performing the

act a real estate dealer within the meaning of the Real Estate Dealers' License Act. See *J. L. Holding Co. v. Reis*, 212 App. Div. 263, 208 N.Y.S. 560, reversed in 240 N.Y. 424, 148 N.E. 623; *Haas v. Greenwald*, 196 Cal. 236, 237 P. 38, 59 A.L.R. 1493, affirmed 275 U.S. 490, 48 S. Ct. 33, 72 L. Ed. 389; *Massie v. Dudley*, 173 Va. 42, 3 S.E. 2d 176; *Cosner v. Hancock*, Tex. Civ. App., 149 S.W. 2d 239, error dismissed, judgment correct.

"The judgment of the Court of Civil Appeals is reversed, and the judgment of the trial court is affirmed."

The case of *Breeding v. Anderson*, 152 Texas 92, 254 S.W. 2d 377, decided by the Supreme Court of Texas in January, 1953, is to the same effect. This Honorable Court ordinarily adopts the construction of a state statute which the highest court of the state puts upon it. In the case of *Weightman v. Clark*, 103 U.S. 256 this Court said at page 260:

"The law then under consideration, like the one here, was not passed until 1869; and we infer from this and other circumstances that such legislation had not been common in the state before that time. The decisions since on the same question have all been one way; and this of itself would make it highly improper for us to depart from them, unless they were clearly wrong. As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute itself. * * *"

In the case of *Security Trust Co. v. Black River National Bank*, 187 U.S. 211, it is said:

"It is scarcely necessary to say that, as respects the first of these inquiries, we must find an answer in the

provisions of the constitution and statutes of Minnesota as interpreted and construed by the Supreme Court of that State."

In *Atlantic Coast Line Railroad Company v. Phillips*, 332 U.S. 168-174, 91 L. Ed. 1977, Mr. Justice Frankfurter said:

> "We should reject the construction which the Georgia Supreme Court has placed upon what the Georgia Legislature of 1833 wrote only *if we can be confident that the Georgia Legislature of 1833, by the words it used, could not have expressed the meaning thus attributed to it.*" (Emphasis supplied)

Respondents submit that the construction and application of the statute in question by the Texas Supreme Court will be adopted by this Honorable Court unless the Court can feel confident that the Texas Legislature of 1939, by the words it used, could not have expressed the meaning attributed to it by the Supreme Court of Texas in the cases of *Gregory v. Roedenbeck*, *Breeding v. Anderson*, supra, and in the case of *Burchfield v. Markham*.

If the construction of the statute by the Texas Supreme Court is adopted by this Honorable Court, then the next question is as stated by Petitioner on page 8 of his Petition, whether its action in so construing and applying such statute violates any of Petitioner's federal rights and deprives him of benefits thereunder.

Police Powers of the State

The authorities, federal and state, are almost unanimous to the effect that a state acting under its police powers can enact such statutes as The Real Estate Dealers' License

Act without violating the constitution of the United States. Under the authorities such statutes do not abridge the privileges and immunities of a citizen, deprive any person of liberty or property, nor deny to him equal protection of the laws.

In the case of *Haas v. Greenwald* (1925), 196 Cal. 236; 237 P. 38; 59 A.L.R. 1493; affirmed 275 U.S. 490; 72 L. Ed. 389; 48 S. Ct. 33 an attorney, A. M. Johnson, not licensed to act as a real estate agent under California law, collaborated with two licensed real estate agents to procure for one Greenwald a contract of sale from Santa Marina Company to Greenwald. Greenwald reniged on the deal. Johnson assigned his interest in the allegedly earned commissions to Haas. Haas, one of the licensed agents in the deal, sued Greenwald. The California Supreme Court denied recovery on the contract, holding that since Johnson, the attorney, being unlicensed to act as a real estate agent, could not make a valid contract for compensation for services as such agent and that the whole contract was void; and that the statute rendering it void was constitutional. This Honorable Court affirmed the judgment of the California Supreme Court, thus constitutionality of the California law.

In the case of *Miller v. Ammon,* 145 U.S. 421, Mr. Justice Brewer speaking for this Court said at page 424:

> "* * * The decision in the *Dennehy* Case determines for the people of the State of Illinois that at the time of the transaction in controversy there was this valid ordinance in the city of Chicago requiring a license. Why should not such decision conclude this plaintiff, as all other citizens of the State, in all their dealings within the State? It will be noticed that this is not

a case in which a citizen of another State calls upon the Federal courts to ignore the judgment of the state court, because of some supposed infringement by it upon his rights. It is a citizen of Chicago, and Illinois, who is asking us to disregard the decision of the highest court of his own State. If it be said that there is not simply a question of municipal or police regulation, but also one of contract rights, the reply is that no question of contract rights can arise till after that of the validity of the ordinance is determined; and also that the party who now seeks to raise the question is one who, as a citizen of the State, ought to be concluded by the decisions of its highest court upon this local matter."

Further in his opinion Mr. Justice Brewer says:

"We do not, however, place our decision so much on this latter ground, nor do we care to follow counsel in their ingenious effort to read into this section of the charter words of limitation. It is enough that the language being upon its face clear, full, and comprehensive, the Supreme Court of the State has decided that it gave power to the council to pass this ordinance, and that it is valid. That decision concluded this plaintiff, a citizen of the State, not only in criminal prosecutions, but also in civil actions, not only in the state, but also in the Federal courts."

The so-called "Blue sky" cases, *Hall v. Geiger-Jones Company, et al.*, 242 U.S. 539; *Caldwell, as Attorney General v. Sioux Falls Stock Yards Company*, 242 U.S. 559; *Merrick, et al. v. N. W. Halsey & Company*, 242 U.S. 568 are clear authorities on the power of a state to enact regulatory laws without violating the Fourteenth Amendment.

In the case of *Williams v. Arkansas*, 217 U.S. 79, Mr. Chief Justice Fuller reiterated the rules, often laid down

by this Court, which govern cases such as this, and held that a statute of Arkansas forbidding drumming and soliciting business on railroad trains did not violate the Fourteenth Amendment, as denying due process, or liberty of contract, or equal protection of the laws.

The case of *Watson v. Maryland*, 218 U.S. 173 is in accord with *Williams v. Arkansas*, supra, and not only holds that a statute regulating physicians and convictions thereunder was not without due process, but that the statute was not discriminatory, nor a denial of equal protection of the laws, but that the construction given the statue by the state supreme court was conclusive upon this Honorable Court. Cases decided by this Honorable Court on the questions here involved are so numerous that the problem of selection is rather bothersome. However, Respondents call attention to the opinion of Mr. Justice Roberts in the case of *Nebbia v. New York*, 291 U.S. 502; 54 S. Ct. 505, wherein he held that the statute regulating the sale of milk did not violate the Fifth or Fourteenth Amendment regarding due process, liberty of contract or equal protection of the laws.

State Supreme Courts which have upheld such laws regulating real estate dealers include those of Alabama, *State v. Polakow's Realty Experts, Inc.* (1942), 243 Ala. 441; 10 So. 2d 461; Cert. den. 319 U.S. 750; Arkansas, *State v. Hurlock* (1932), 185 Ark. 807; California, *Riley v. Chambers* (1919), 181 Cal. 589; Florida, *State ex rel. Davis v. Rose* (1929), 97 Fla. 710; Georgia, *Camp v. State* (1930), 171 Ga. 25; Illinois, *Braun v. Chicago* (1884), 110 Ill. 186; Kentucky, *Shelton v. McCarroll* (1948), 308 Ky. 288; Louisiana, *Zerlin v. Louisiana Real Estate Board* (1925), 158 La. 111; Missouri, *St. Louis v. McCann*

(1900), 157 Mo. 301; New Mexico, *State v. Spears* (1953), 57 N. M. 400; New York, *Roman v. Lobe* (1926), 243 N.Y. 51; Oklahoma, *Re Pope* (1925), 33 Okla. Crim. 5; Oregon, *Hunter v. Cunning* (1945), 176 Ore. 250; Tennessee, *Davis v. Hailey* (1920), 143 Tenn. 247; Texas, *Gregory v. Roedenbeck* (1943), 141 Tex. 543; Virginia, *Massie v. Dudley* (1939), 173 Va. 42; Wisconsin, *Payne v. Volkman* (1924), 183 Wis. 412. All of the above listed State Supreme Court cases and more are cited in 39 A.L.R. 2d 609 in the annotations to *State v. Spears*, 57 N. M. 400, 39 A.L.R. 2d 595.

Respondents fail to see why an attorney at law should need or desire more protection or more privileges and immunities under the Constitution of the United States than other citizens. There is nothing sacrosanct about an attorney that entitles him to greater protection. He has a license to practice law. Otherwise, he is like other licensed professional men, doctors, dentists, engineers, architects, officers of our armed forces: all of these are subject to regulatory laws, which have been uniformly upheld as constitutional, when not arbitrary, capricious or discriminatory. And there is no showing that the Texas statute is more arbitrary, capricious or discriminatory than other real estate dealers' license acts which have been repeatedly upheld as constitutional. The inhibition against dividing compensation applies to every person not licensed under the Act. It is, therefore, not discriminatory. It follows a definite pattern set by other constitutional statutes; therefore, it is not capricious. It is supported by fair, solid, substantial reasons; it is, therefore, not arbitrary. It is such a statute as comes within the sound discretion of the legislature to pass; it is constitutional.

Real estate dealers' licensing acts, very similar to the Texas act have had their constitutionality upheld by the highest courts of many states. Among them is the Supreme Court of New Mexico which upheld that state's act in the case of *State v. Spears*, 57 N. M. 400; 259 P 2d 356, which is annotated at page 608 of 39 A.L.R. 2d. In view of the opinions of this Honorable Court above cited, Respondents think it unnecessary further to discuss the opinions of State Supreme Courts which have almost unanimously upheld the constitutionality of such acts.

Respondents would here point out that Petitioner may be estopped to say the statute is unconstitutional. He claims he is exempt from the statute, which, if true, is a privilege and benefit to him. He cannot receive a benefit from the statute and at the same time have declared unconstitutional its most important provision, *United States v. San Francisco*, 310 U.S. 16-32; *Fahey, et al. v. Mallonee*, 332 U. S. 245-258. If a person can obtain a license and make a valid contract to compensate unlicensed persons for services rendered him in selling real estate, the whole law would be rendered ineffective and vain.

Reply To Petitioners' Statement of Reasons

We come now to a discussion of Petitioners "Reason for Granting Writ of Certiorari Herein".

First, however, Respondents would point out that Petitioner at page 12 of his Petition totally misconstrues the effect of the Texas Supreme Court's refusal to grant a writ of error in that first appeal of this case. Respondents do not believe Petitioner will deny that it was Petitioner and not Respondents who made application for the writ; that the grounds stated for the granting of the writ were;

First, the error of the Court of Civil Appeals in reversing the judgment for Larry Gibbard and remanding the case for trial on the merits; Second, the error of the Court of Civil Appeals in overruling Respondents cross points which were in effect that the trial court erred in denying to Petitioners recovery of attorney's fees; and third, the Court of Civil Appeals erred in reversing and remanding, and in not affirming the judgment of the trial court. By such an application no question concerning a construction of the Real Estate Dealers' License Act was presented to the Texas Supreme Court on the first appeal, and no such question was impliedly answered by a refusal thereof. As stated in this case by Justice McCall "By refusing the application for writ of error with the notation of 'no reversible error' the Supreme Court approved only the result reached by the Court of Civil Appeals and not the statements as to the law in the opinion." The results reached by the Court of Civil Appeals on the first appeal was that Larry Gibbard was not entitled to recover, that Petitioner Markham was not entitled to attorney's fees, and that petitioner was not entitled to summary judgment.

At the time Petitioners' application for a writ was refused, the Texas Supreme Court could not know what facts a trial on the merits would develop. It would be a strange phenomenon if an appellate court should undertake to construe and apply a statute to disputed facts. And the Supreme Court of Texas did not undertake such a task on the first appeal of this case.

But even if the Texas Supreme Court on the incomplete record before it in the first appeal had on casual consideration without all the facts before it impliedly construed the law as Petitioner contends, it had the jurisdiction,

power, and duty to correct its error on the second appeal, such jurisdiction, power, and duty being inherent in all courts of final resort. *Connecticut General Life Ins. Co. v. Bryson,* 148 Tex. 86; 219 S.W. 2d 799.

Prayer

Wherefore, Respondents pray this Honorable Court to enter an order denying the Petition for Writ of Certiorari.

Respectfully submitted,

YOUNG FRANK JUNGMAN
Attorney for Respondents
5440 Del Monte
Houston, Texas
MO 5-0511

K. D. KEENAN
GEORGE RED
PAT N. FAHEY
Of Counsel

Certificate of Service

I certify that a copy of the foregoing Brief of Respondents in Opposition to the Granting of a Writ of Certiorari has been mailed, on the _____ day of May, 1957, to Honorable Curtis E. Hill, 2521 Republic Bank Building, Dallas 1, Texas, attorney for Petitioners, and Messrs. Liddell, Austin, Dawson and Huggins, 1017 Chronicle Building, Houston, Texas, attorneys for intervenors in the state court proceedings.

YOUNG FRANK JUNGMAN

FILED
JUN 29 1957
JOHN T. FEY, Clerk

No. 939

In the

Supreme Court of the United States

OCTOBER TERM, 1956

E. L. MARKHAM, JR., *et al.*,
Petitioners,

v.

R. O. BURCHFIELD, *et al.*,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

CURTIS E. HILL,
2521 Republic Bank Building,
Dallas, Texas,
Attorney for Petitioners.

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R. O. BURCHFIELD, *et al.*,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, E. L. Markham, Jr. prays that this Court grant rehearing of its order of June 3, 1957, denying the petition for writ of certiorari, 353 U. S. ....., and that a writ of certiorari issue to review the judgment of the Supreme Court of Texas in the above entitled case as prayed for in the petition filed April 25, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of June 3, 1957, there was not before this Court in said petition for certiorari, certain specific facts, which are hereinafter set forth, with respect to Civil Action No. 6271, styled William L. Hanna v. Home Insurance Company, which is still pending on the docket of the United States District Court for the Northern District of Texas, Dallas Division, which specific facts are most important to this Court's consideration and determination of this proceeding for certiorari, same being as follows, to-wit:

(A). The extremely arbitrary, unjudicial and unlawful action taken by the Supreme Court of Texas in rendering the judgment herein against petitioners, resulted from no judicial reason that can possibly be gleaned from the certified copy of the entire record of the proceedings had in state court, which accompanies the instant proceedings, so, therefore, the conclusion is compelled that such action was taken by the Supreme Court of Texas, against petitioners as an outright punitive sanction against your petitioners' counsel for his having filed and prosecuted for plaintiff, William L. Hanna, said above mentioned Hanna v. Home Insurance Company litigation, since the latter presents the only plausible reason for such action in the complete absence of any judicial reason therefor.

(B). That in strong probability the said Hanna v. Home Insurance Company litigation will be presented to this

Court on petition for writ of certiorari before this Court convenes for its October, 1957 Term of Court.

(C). That accompanying such petition for certiorari, as an exhibit to plaintiff's complaint, will be a certified copy of the entire record of the proceedings had through the entire range of the state courts of Texas, from a pretended trial court proceeding, through an intermediate appellate court, and thence through the Supreme Court of Texas.

(D). That such certified copy of such entire record of said state court proceedings, from matters "apparent on the face of the record" in contemplation of the law of collateral attack, and other matters of admissible evidence which have occurred either during and in connection with said state court proceedings, or since said proceedings became final, or since the filing of the said Hanna v. Home Insurance Company litigation in federal court, will show with ultimate conclusiveness, that the judge of the state trial court in question, the attorneys who represented defendant in the state court litigation, the clerk of the state trial court, and certain persons of the Office of the Constable in and for Precinct One of Dallas County, Texas, who either served or pretended to serve a subpoena on Dr. W. B. Weary, a material witness for plaintiff in said state court litigation, in two separate combinations and no two separate occasions, violated *Article 358 of the Penal Code of Texas*, which reads as follows, to-wit:

> "If any clerk of a court shall knowingly make any false entry upon the record of his court which may

> prejudice or injure the rights of any person he shall be confined in the penitentiary not less than two nor more than five years."

and *Article 1002 of the Penal Code of Texas*, which reads as follows, to-wit:

> "If any person, without authority of law, shall willfully and maliciously change, alter, mutilate, destroy, deface, or injure any book, paper, record or any other document, required or permitted to be kept by any officer of this State, he shall be fined not exceeding five thousand dollars, or imprisoned in the penitentiary not less than one nor more than five years."

and that under the provisions of the Penal Code of Texas, all of such offenders were either principals or accessories to such crime; that also the judges of the state appellate courts through which such litigation was appealed, who had participation in the judicial action which was taken against the said plaintiff William L. Hanna in said state court litigation, were either principals or accessories to such crimes on account of their affirmative duty, under various theories of law, to take affirmative action against those, who had, as was apparent from the record of the state litigation on appeal, violated such above quoted provisions of the Penal Code of Texas, since such appellate court judges not only failed and refused to take any affirmative action against such offenders with respect to such criminal violations, but instead ordered sanctions against your undersigned counsel for petitioners for urging such conduct of such offenders, which constituted such criminal offenses, as grounds for reversal of the adverse judgment of the trial court; that after the state court litigation had been

completed, the Hanna v. Home Insurance Company litigation had been filed in federal court, and your undersigned had long before ordered and was attempting to obtain from the said clerk of said state intermediate appellate court, a certified copy of the entire record of the proceedings in such state court litigation, having in mind to make same a part of an amended complaint to be filed in such federal court litigation, said clerk of said court and one of the attorneys for defendant in the Hanna v. Home Insurance Company federal court litigation, violated *U. S. C. A. Title 18, Section 1503*, in its provisions pertinent to their conduct immediately hereinafter described, such pertinent provisions thereof, reading as follows, to-wit:

> "Whoever corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct or impede the due administration of justice, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

in that while said clerk, under the pretense of not having in his file and possession, a certain very important instrument, which was a part of the record of such state intermediate appellate court proceedings, fraudulently withheld from your undersigned counsel, for use in connection with the preparation and filing of an amended complaint in said Hanna v. Home Insurance Company federal court litigation, a certified copy of the entire record of such state court proceedings, which said counsel had long before ordered from said clerk, said attorney for said defendant exerted strenuous efforts to obtain an order of dismissal of said action in federal court and throughout said

time, both said clerk and said attorney for defendant, both well knew from the express statement set forth in the original complaint which had been filed in said Hanna v. Home Insurance Company litigation in federal court, that said certified copy of the entire record of said state court proceedings, which your undersigned had not, because of the conduct of said clerk in withholding same as above alleged, been able to obtain and make a part of said complaint, was an indispensable part of the allegations of a complaint in said action, which would be sufficient against a motion to dismiss; that further all of the conduct, as alleged, which constituted such violations of such articles of the Penal Code of Texas and said federal obstruction of justice criminal statute, as above set forth, likewise was in violation of *U. S. C. A. Title 18, Section 243*, which reads as follows, to-wit:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * *. They shall be fined not more than $5,000 or imprisoned not more than ten years or both."

in that all of such conduct so constituting such criminal violations, was a part of the connected chain of conspiracy and fraud, which, together with its purpose and objectives, is briefly described at page 16 of the petition for certiorari herein filed, and that there were many other acts of conduct by all of said conspirators which will be reflected by said certified copy of the entire record of said state court pro-

ceedings, which were done in furtherance of said civil conspiracy, which constituted fraud upon Hanna as a matter of law, which do not constitute any of the operative facts of any violation of criminal laws.

(E). That while petitioner does not contend that this Court has, in the instant case, any duty of, or authority to, take judicial notice of matters of law and/or fact which will be shown in the petition for writ of certiorari and accompanying certified copy of the entire record of the state court proceedings which will come before this Court in the Hanna v. Home Insurance Company litigation and give effect to such matters so judicially noticed as if same were part of the operative facts shown in the record of the instant litigation, we respectfully point out that this Court does have the duty and authority of taking judicial notice of the matters of law and/or fact from the petition for writ of certiorari and record to be filed in this Court in the said Hanna v. Home Insurance Company litigation, if same is filed in this Court while the instant cause is pending as active and live litigation on the docket of this Court, and give effect to such matters of law and/or fact to the extent of finding a reason for the extremely arbitrary, unjudicial and unlawful action taken against petitioner by the Supreme Court of Texas in this litigation and particularly in light of the fact that no judicial reason for such action can be found from the record of the state court proceedings.

(F). That this Court in considering this petition for rehearing of order denying the petition for writ of certiorari, in connection with the petition for certiorari and

accompanying record of state court proceedings in the Hanna v. Home Insurance Company state court litigation, to the extent above indicated, will be relieved from the delicacies, which usually attend this Court's consideration and settlement of matters involving a conflict of state and federal judicial power and operations because when such two proceedings in this Court are so considered together, this Court will not be considering and dealing with good faith judicial action so tainted with error as to fundamental federal rights as to amount to an arbitrary exercise by state courts of their judicial power, but it will be considering and dealing with outright corruption, subversion and criminality of state courts, right through the ultimate fundamentals of the state court's judicial procedures and process.

(G). That the totality of the matters and things herein set forth, when presented and shown to this Court in the manner and to the extent hereinabove set forth, will show that this litigation and that of Hanna v. Home Insurance Company, hereinabove mentioned, which will very shortly come before this Court in proper proceedings, are matters of perhaps the greatest importance to the people of the State of Texas and the United States of all which have come before this Court in its history, because either this Court or some inferior federal court, when confronted with indisputable evidence of facts as hereinabove alleged in connection with the Hanna v. Home Insurance Company litigation, must either hold that the persons connected with said courts, as above alleged, have an immunity from liabil-

ity for conduct of such character and legal and judicial effect which occurs in connection with a so-called judicial proceeding, which would be to destroy our state court judicial system, or that there is liability on the part of such persons.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Texas, sitting at Austin, Texas.

Respectfully submitted,

CURTIS E. HILL,
2521 Republic Bank Building,
Dallas, Texas,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

.....

CURTIS E. HILL.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for rehearing of order denying petition for writ of certiorari has been mailed, on the 27th day of June, A. D. 1957, to Honorable George Red and Pat Fahey, 1513 Travis Street, Houston, Texas, attorneys for respondents, and Messrs. Liddell, Austin, Dawson and Huggins, 1017 Chronicle Building, Houston, Texas, attorneys for intervenors in the state court proceedings.

.....

CURTIS E. HILL.